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No. 87-982

In the Supreme Court of the United States

OCTOBER TERM, 1987

DONALD HOLLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court's failure to advise petitioner of his right to retain separate counsel and the risks of joint representation requires reversal of his conviction, even without any showing that his attorney labored under a conflict of interest that adversely affected his performance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A4-A12) is reported at 826 F.2d 331.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1987. The petition for a writ of certiorari was filed on October 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on one count of conspiring to make false entries in the records of the Farmers Home Administration (FmHA) and false FmHA contracts, in violation of 18 U.S.C. 371, 495, and 1006, and on 25 counts of making

false statements to a government agency, in violation of 18 U.S.C. 1001. He was sentenced to a two-year term of imprisonment, which was suspended in favor of four years' probation.

1. In 1981 and 1982, petitioner served as a county supervisor for the FmHA in Fulton, Mississippi. One of his responsibilities was to oversee the rehabilitation of vacant houses held for resale by the FmHA. His co-defendant, W.L. Hyland, was a construction inspector for the FmHA during that period. Hyland, a former carpenter and construction contractor, inspected FmHA houses for necessary repairs and verified the satisfactory completion of those repairs. Pet. App. A5.

Between April 1981 and October 1982, petitioner approved 43 repair contracts in which Steven Browning, Hyland's 12-year-old stepson, was the named contractor. The evidence at trial showed that Hyland signed Browning's name to the contracts without Browning's consent or authorization. Although certain of the repairs specified in the contracts were completed by various Hyland family members, including Browning, many others remained unperformed. Checks for the repair contracts nevertheless were issued in Browning's name by the FmHA, were signed in his name by his stepmother, and were cashed by his grandmother. Pet. App. A5.

Petitioner testified at trial in his own defense. Although he had previously told an FmHA investigator that he witnessed Browning sign each of the repair contracts, he testified at trial that that statement was incorrect. Instead, petitioner testified, he knew Hyland was signing the contracts on Browning's behalf, but he did not regard that procedure as unusual when he knew both parties (4 R. 440, 484). Petitioner said he had not corrected the false statement he made to the investigator because he did not regard it as important at the time (4 R. 471-472). In addition,

petitioner asserted that in 1982, after reviewing FmHA regulations pertaining to conflicts of interest, he stopped approving repair contracts with Browning as the named contractor. Petitioner summarized his position at trial by testifying that he was just trying to get the repair work done, and while he may have violated some regulations, he did not have any intent to defraud the government. 4 R. 438-439, 442; Pet. App. A5-A6.

b. Petitioner and Hyland were represented at trial by the same attorney. On appeal, petitioner argued that his convictions should be reversed because the trial court failed to comply with Fed. R. Crim. P. 44(c). Petitioner noted that the trial court had failed to inquire into any potential conflicts of interest stemming from the joint representation and had failed to advise each defendant of his right to separate representation.[1] While agreeing that "[t]he district judge in this case neither made the requisite inquiry nor rendered the appropriate advice," the court of appeals nonetheless affirmed (Pet. App. A6). The inquiry and advice provided by Rule 44(c), the court concluded, are not ends in themselves; rather, they are designed "to prevent conflicts that may be associated with joint representation" (Pet. App. A7). The court accordingly

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[1] Fed. R. Crim. P. 44(c) provides that:

> Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

held that even where a trial court fails to comply with Rule 44(c), a defendant still must demonstrate "an actual conflict of interest" before his conviction will be reversed (Pet. App. A6).

Relying on this Court's decision in *Burger* v. *Kemp*, No. 86-5375 (June 26, 1987), the court of appeals noted (Pet. App. A7) that the appropriate inquiry is "whether [petitioner] can demonstrate that his attorney actively represented conflicting interests and the conflict adversely affected his lawyer's performance." Petitioner argued (*id.* at A8) that his defense conflicted with that of his co-defendant because, but for their joint representation, petitioner could have advanced several potentially exonerating arguments. The court of appeals examined each of those arguments and concluded (*id.* at A8-A9) that they were not inconsistent with any defense raised by Hyland. The court noted that, in fact, petitioner had presented at least one of those arguments to the jury. Because "[m]ere speculation about a conflict * * * is insufficient to establish ineffective representation," and because petitioner had "not shown an actual conflict of interest" as a result of the joint representation, the court of appeals affirmed (*id.* at A9 (citation omitted)).

ARGUMENT

Petitioner renews his claim (Pet. 6-8) that he was forced by his counsel's joint representation to forgo advancing several strong theories of defense at trial. Petitioner, however, simply repeats the arguments he made to the court of appeals; he fails to take issue with the analysis that led the court of appeals to conclude that no actual conflict of interest existed because he was not prevented from making any potentially exonerating arguments at trial.

Petitioner first contends that the court of appeals erred in concluding that he must demonstrate an actual conflict of interest in order to be entitled to reversal of his conviction. Petitioner appears to regard the court's reference to an actual conflict of interest as requiring proof that there be a conflict between the defenses actually adopted by the jointly represented defendants (Pet. 8). Since that is not likely to happen in any case where the defendants are jointly represented, petitioner argues that the court of appeals' rule would almost never result in relief despite a clear showing of prejudice to one or both of the jointly represented defendants. In fact, however, petitioner has misconstrued the court of appeals' holding. In order to obtain relief, the court held that a defendant must show that his lawyer actively represented conflicting interests and that the conflict adversely affected the lawyer's performance. Pet. App. A7. Such a conflict of interest, the court held, is present whenever one defendant " 'stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing.' " *Id.* at A8 (quoting *Foxworth* v. *Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975)). Thus, the fact that two defendants adopt consistent defenses is not the end of the inquiry, as petitioner suggests. Instead, the court of appeals recognized that a defendant can obtain relief in such a case if he can show that he would have benefited from an argument or evidence that would have damaged his jointly represented co-defendant.

Petitioner suggests (Pet. 9) that the mere possibility of prejudice should be enough to warrant reversal in a case in which the district court does not obtain a valid waiver of the defendant's right to separate representation. But there is at least a potential for a conflict of interest in every case of multiple representation. See *Cuyler* v. *Sullivan*, 446

U.S. 335, 348 (1980). Thus, petitioner is effectively arguing for a rule of per se reversal in every case in which two or more defendants represented by the same attorney are not expressly warned of the dangers of multiple representation.

The short answer to that argument is that it has already been expressly rejected by this Court, most recently in *Burger* v. *Kemp*, No. 86-5375 (June 26, 1987), slip op. 7 (quoting *Cuyler* v. *Sullivan*, 446 U.S. at 348), in which the Court stated: "We have never held that the possibility of prejudice that 'inheres in almost every instance of multiple representation' justifies the adoption of an inflexible rule that would presume prejudice in all such cases. * * * Instead, we presume prejudice only if * * * 'an actual conflict of interest adversely affected [a] lawyer's performance.' " See also *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984). Both *Burger* and *Cuyler* were state court cases to which Rule 44(c) had no application. But there is no reason why Rule 44(c) should change the relevant inquiry.

As the court of appeals noted (Pet. App. A7), Rule 44(c) is designed to implement the Sixth Amendment's guarantee that every criminal defendant receive effective assistance of counsel unhindered by conflicts of interest. So long as a defendant suffers no denigration of that right, the concern underlying Rule 44(c) and the Sixth Amendment itself has been served whether or not the text of the Rule has been followed to the letter. The advisory committee notes to Rule 44 make clear that a violation of Rule 44(c) was not intended to give rise to a per se rule of reversal: "[t]he failure in a particular case to conduct a rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant." Rule 44(c) advisory committee note.

In this case, petitioner has not pointed to any way in which his defense was hindered by a conflict of interest

arising from the joint representation. Petitioner suggests (Pet. 6-8) that but for the joint representation, he could have made the following arguments at trial: (1) that he did not obtain any of the money that was paid to perform the contracts; (2) that he did not know that Browning had not authorized his stepfather to sign the contracts on his behalf; and (3) that he had no motive to assist Hyland in preparing and submitting the false contracts, since he was getting nothing out of the arrangement.

The first and third arguments are variations on the same theme: that petitioner gained nothing as a result of the illegal scheme and therefore must not have willfully participated in it. As the court of appeals observed, however (Pet. App. A9), petitioner made precisely that argument at trial: he testifed that he obtained no benefit from the "stepson contracts," and he testified that he regarded Hyland's use of his stepson as a contractor to be a permissible measure that helped get work done that otherwise would have been difficult to complete. There was nothing inconsistent between that defense and Hyland's defense—that the work was done properly and that Hyland did not receive any of the money from the repair contracts. It is highly doubtful that petitioner would have benefited by suggesting that Hyland was engaged in some serious impropriety to which petitioner was not a knowing party.

The second argument that petitioner proposes—lack of knowledge that Browning's signature was unauthorized—was also not at odds with Hyland's defense, and thus was not a theory that was rendered unavailable to petitioner because of the joint representation. The only way that a defense of lack of knowledge on petitioner's part would have been damaging to Hyland would be if Hyland had taken the position that he told petitioner he was not authorized to execute the contracts in Browning's name. In fact, however, Hyland's position was quite the opposite of

that: he testified that Browning had authorized him to sign on his behalf. By testifying that it was normal procedure for one party to sign FmHA contracts on behalf of another, petitioner explained why he had no reason to question the legitimacy of Hyland's signing for Browning. In effect, that theory of defense incorporated and gave an explanation for the theory that petitioner believed in good faith that Hyland was authorized to execute the contracts on Browning's behalf. Thus, as the court of appeals explained (Pet. App. A8-A9), the defenses of the two jointly represented defendants were entirely consistent on that point, and there was no showing that petitioner was prevented from pursuing any theory of defense that might have proved fruitful.

In sum, petitioner has failed to identify a conflict between Hyland's interests and any defense that petitioner might reasonably have relied on at trial. Rather, it appears that the most likely prospect for success lay in the joint defense that the procedure followed in executing and performing the contracts was a common one that got the work done and did not result in any loss to the government or any benefit to either defendant. In the absence of any showing that petitioner's defense was impaired by an actual conflict of interest, reversal is not required.[2]

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[2] Petitioner contends (Pet. 12-13) that the decision below conflicts with the decisions of two other courts of appeals. That is incorrect. The two cases upon which petitioner relies, *United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976), and *Campbell* v. *United States*, 352 F.2d 359 (D.C. Cir. 1965), held that the failure of a trial judge to inquire into and warn against multiple representation creates a presumption of a prejudicial conflict of interest. But both of those cases were decided prior to this Court's decision in *Cuyler* v. *Sullivan, supra*, which rejected that position and adopted a somewhat different rule—that prejudice is presumed, but only if an actual conflict of interest adversely affected the attorney's performance. In any event, *Carrigan* and

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Campbell were decided prior to the adoption of Rule 44(c) and thus have no bearing on the specific question presented here.

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